85-1074

Supreme Court, U.S.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF FLORIDA,

Petitioner,

vs.

JERRY HALIBURTON,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE FIFTH AMENDMENT'S SELF-INCRIMINATION CLAUSE AND MIRANDA v. ARIZONA, 384 U.S. 436 (1966) REQUIRE SUPPRESSION OF A DEFENDANT'S STATEMENT, MADE AFTER PROPER MIRANDA WARNINGS AND REPEATED VALID WAIVERS OF RIGHTS, SOLELY BECAUSE THE DEFENDANT WAS NOT INFORMED THAT AN ATTORNEY, UNREQUESTED BY THE DEFENDANT AND RETAINED BY A THIRD PARTY, WAS AT THE POLICE STATION SEEKING TO SPEAK TO HIM?

II

WHETHER THE FLORIDA SUPREME COURT'S FAILURE TO CONSIDER THAT THE ALLEGED CONSTITUTIONAL ERROR IN THE ADMISSION OF A DEFENDANT'S STATEMENTS WAS HARMLESS BEYOND A REASONABLE DOUBT IN LIGHT OF OTHER EVIDENCE, INCLUDING THE TESTIMONY OF TWO OTHER WITNESSES TO WHOM THE DEFENDANT HAD CONFESSED IN DETAIL TO COMMITTING THE MURDER, CONFLICTS WITH THIS COURT'S DECISION IN MILTON v. WAIWNRIGHT, 407 U.S. 371 (1972)?

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PREFACE

The Petitioner, the State of Florida, was the Appellee in the Supreme Court of Florida. The Respondent, Jerry Hailburton, was the Appellant in the Supreme Court of Florida. In this brief, the parties will be referred to as they appear before this Court.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this Court, which are contained in the Petitioner's Appendix and consists of pages A1- A28.

OPINIONS BELOW

The decision of the Supreme Court of the State of Florida was rendered on August 30, 1985. It is not yet reported, but is reproduced in the state's Appendix at (A 1 - A 11). Rehearing was denied on October 24,

1985. (A. 12- A. 13). The order of the state trial court denying the defendant's motion to suppress, rendered on November 8, 1982, is unreported, but reproduced at (A. 14 - A. 15).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the Supreme Court of Florida was rendered on August 30, 1985. The Petitioner timely petitioned for rehearing. The motion for rehearing was denied on October 24, 1985. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Title 28 U.S.C. § 1257(3).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED[1/]

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

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1/ The Sixth Amendment right to counsel is not involved in the present case where the police questioning occurred pre-indictment, see United States v. Gouveia, ___ U.S. ___, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984), and Respondent never requested counsel. Compare Escobedo v. Illinois, 378 U.S. 478 (1964).

property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Respondent, Jerry Haliburton, was indicted for the crimes of burglary and first degree murder. On August 9, 1981, between 5:00 and 5:30 p.m., the body of Don Bohanon was found in his bed in his apartment in West Palm Beach, Florida. Medical evidence indicated that death, cause by multiple stab wounds had occurred between 12:30 a.m. and 12:30 p.m. that day. Police suspected a burglary because newly replaced jalousies had been removed from the apartment door and several hundred dollars were missing. Fingerprints taken from the jalousies matched Respondent's who lived nearby in downtown West Palm Beach.

On August 13, 1981, at about 6:30 a.m., Respondent, who was an experienced defendant in the criminal justice sytem, was taken to the West Palm Beach police station. He was advised of his rights, indicated that he understood all of the rights, stating that there was no reason not to speak to the officers, and when asked if he wanted an attorney replied "No, not right now." Respondent never requested an attorney thereafter. At approximately 7:00 a.m., the officers began interrogating the Respondent until 9:30 a.m., and then again at 10:00 a.m. for another ten minutes. At that point Respondent agreed to undergo a polygraph examination.

At approximately 2:00 p.m., the polygraph examiner arrived. Respon-

dent was again advised of his rights. Respondent never indicated that he wanted a lawyer or that he did not want to answer any questions. Respondent then submitted to a polygraph examination. Meanwhile, between 2:00 and 3:00 p.m., Respondent's sister retained a lawyer, Thomas Burford, to represent the Respondent. Burford called the police department at either 2:45 or 3:47 p.m.,[2/] and informed the police that he had been retained by Respondent's sister and that he wanted no further questioning of the Respondent. Burford was told that the police were near the end of the polygraph examination and that it could not be interrupted. Burford stated that he under-

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[2/] There is a conflict in testimony as to when that call was received.

stood and did not insist that the polygraph be interrupted. The polygraph was completed at approximately 3:29 p.m. The polygraph examiner told Respondent that his responses indicated deception. Thereafter, Respondent changed his story, stating that he had in fact broken into Bohannon's apartment, saw Bohannon bleeding profusely in his bed, and then fled. A post-test release agreement was executed at 3:48 p.m.

At that point, one of the officers testified that he told Respondent that one of his sisters had called a lawyer for him who was suppose to come to the police station. (A. 16, 18). Respondent did not say he wanted to or did not want to talk to the lawyer, "he just sort of slunked his shoul-

ders." (A. 16-17).[3] After further conversation to see if the Respondent wanted to continue talking, the taped statement resumed at 3:56 p.m. and continued until 4:20 p.m.

At approximately 3:58 p.m., attorney Burford arrived at the police station and asked to speak to the Respondent. However, he was refused

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[3] The officer who testified to telling Respondent about the lawyer was contradicted by two other officers, as well as his own pretrial deposition. (A. 20-21). The officer explained his contrary statements at the hearing. The fact that the officer's testimony was contradicted by other state witnesses is irrelevant because where as in in the instant case, there is no specific factual findings by the trial court on the motion to suppress, Florida requires the reviewing court to interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978).

access to the Respondent. By 4:18 p.m., Burford had a telephone court order requiring that the police give him access to the Respondent. After a second phone call from the judge, the police chief ordered that the interrogation cease, and Burford was able to see the Respondent.

Without making specific findings of fact, the trial court denied Respondent's motion to suppress. (A.14-15). The recorded statement from 3:56 p.m. until 4:20 p.m., in which the Respondent admitted breaking in and seeing the body, but denying the murder, was played for the jury. In addition, a tape recording of Respondent's statements at 7:00 a.m. and 10:00 a.m., where Respondent stated that he had been in Bohannon's

apartment only one time, to smoke some marijuana joints in the bedroom, was also played for the jury. Those statements were contradicted at trial by witnesses who testified that Bohannon was somewhat of a racist who did not socialize with blacks. Also introduced at trial was the testimony of Respondent's brother, Freddie Haliburton, and Freddie's girlfriend, Sharon Williams. Freddie Haliburton testified that in December of 1981, Respondent confessed that he had killed the victim, and described how and why he did it. Sharon Williams testified that during an attack on her by Respondent in March of 1982, Respondent told her that he had committed the murder. Both she and Freddie Haliburton subsequently went to the

police station and gave separate statements.

Respondent was convicted of burglary and first degree murder and sentenced to death. Respondent appealed his convictions and sentence to the Supreme Court of Florida. Respondent alleged in his appeal that his waiver of counsel was not knowing and voluntary where he was not told that his family had provided an attorney for him. The Petitioner responded that this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966) did not mandate such a result. The Supreme Court of Florida, citing the dissenting opinion of Chief Justice Bevilacqua of the Rhode Island Supreme Court in State v. Burbine, 451 A.2d 22, 35 (R.I. 1982) (Bevilacqua, C. J., dissenting), held that the

failure of the police to inform the Respondent that an attorney retained by his sister on his behalf was in the station house requesting to speak with him, violated Respondent's otherwise valid waiver of his right to counsel. (A. 6-7, 9). The court reversed the convictions finding the failure to suppress the recorded statement to be reversible error. (A. 10). The Petitioner filed for rehearing, which the Florida Supreme Court denied. The Florida Supreme Court did grant a temporary stay of the mandate pending review in this Court, which this Court extended by order on November 14, 1985. The instant Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

This Court, in its opinion in Miranda v. Arizona, 384 U.S. 436 (1966), for the first time provided a set of police guidelines to balance the societal need for police interrogation with an accused's right under the Fifth Amendment to be protected against undue coercive pressures which compel him to be a witness against himself. The rules provide that the police must advise or warn a suspect of a number of "personal" rights, including the right to remain silent, and the right to the presence of an attorney, either retained or appointed. 384 U.S. at 467-470.

As a corollary to these advice of rights, this Court recognized that a

suspect, after having been properly informed of his rights could waive any or all of those rights, but such waiver must have been made "voluntarily, knowingly and intelligently." 384 U.S. at 479. The making of that determination, depends on all of the facts of each particular case, Fare v. Michael C., 422 U.S. 707, 724-725 (1970), and the courts must review the totality of the circumstances surrounding the waiver, including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Although the requirements of Miranda and the determination of waiver may seem simple on their face, the courts in struggling with the area of police interrogation, particularily where

an unrequested attorney, retained by a third party enters into the proceedings, have found the opposite to be the case. For this reason this Court should accept jurisdiction.

A. WHETHER THE FIFTH AMENDMENT'S SELF-INCRIMINATION CLAUSE AND MIRANDA V. ARIZONA, REQUIRE SUPPRESSION OF A DEFENDANT'S STATEMENT, MADE AFTER PROPER MIRANDA WARNINGS AND REPEATED VALID WAIVERS OF RIGHTS, SOLELY BECAUSE THE DEFENDANT WAS NOT INFORMED THAT AN ATTORNEY, UNREQUESTED BY THE DEFENDANT AND RETAINED BY A THIRD PARTY, WAS AT THE POLICE STATION SEEKING TO SPEAK TO HIM.

The Supreme Court of Florida, in the present case, has construed the Fifth Amendment's Self Incrimination Clause and this Court's decision in Miranda v. Arizona, supra, to require the police to not only inform a suspect of his right to counsel, but if a

third party has retained counsel for the suspect without the suspect's request, to also inform the suspect that said lawyer is in the station house requesting to speak with the suspect. The failure to convey such information, by itself, without reviewing the other circumstances, vitiated all prior valid waivers by the suspect of his rights. (A. 9). This construction of the Fifth Amendment conflicts with the construction given the Self-Incrimination Clause under similar circumstances by various other state courts of last resort.

In State v. Burbine, 451 A.2d 22 (R.I. 1982), the majority of the Supreme Court of Rhode Island rejected the requirement that the police officers inform the accused

that counsel retained by his sister had called and inquired about him. Instead the Rhode Island Court looked at the totality of the circumstnaces to determine whether that additional information was necessary for the accused to make an informed decision as to waiver. 451 A.2d at 29-30. The Florida Supreme Court's decision in the present case conflicts with State v. Burbine, because the Florida court adopted the holding of the dissenting opinion in the Rhode Island case. (A. 6-7). The First Circuit Court of Appeals also subsequently rejected the majority opinion of Burbine, and ordered the district court to grant Burbine's petition for writ of habeas corpus. Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985).

This Court has since granted jurisdiction to review Rhode Island's petition for writ of certiorari. Moran v. Burbine, ___ U.S. ____, 105 S.Ct. 2319, 85 L.Ed.2d 838 (1985). Other state courts of last resort which have held that the police are not obligated to tell a defendant of an unrequested lawyer's call or attempts to contact him include Georgia, Blanks v. State, 254 Ga. 420, 330 S.E.2d 575, 578-599 (1985); Iowa, State v. Blanford, 306 N.W. 2d 93, 96-97 (Iowa 1981); Missouri, State v. Beck, 687 S.W.2d 155, 158-159(1985); Ohio, State v. Chase, 55 Ohio, St.2d. 237, 378 N.E.2d 1064, 1069-1070 (1978); and Wyoming, Wheeler v. State, 765 P.2d 861, 862-863 (Wyo. 1985).[4/]

[4/] A California appellate court

Petitioner recognizes the Supreme Court of Florida's opinion in the instant case is consistent with other states which have held that the Fifth Amendment requires that law enforcement officers inform an accused of a requested or unrequested attorney's efforts to reach him. The failure to do so forcloses the officer's reliance on the statements as evidence against him. See, e.g.,

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(Footnote 4 continued), decision likewise rejected this requirement. People v. Gott, 117 Cal. App. 3d 125, 173 Cal. Rptr. 469, 471-472 (1981). Pennsylvania also initially followed these line of cases. See Commonwealth v. Yates, 467 Pa. 362, 357 A.2d 134, 135-136 (1976). A recent Texas appellate court decision, similarly refused to adopt a per se requirement of notification to the accused, looking instead to the totality of the circumstances, to find that in the specific case the absence of such notification made the waiver involuntary. Dunn v. State, 696 S.W. 2d 561 (Tex Cr. App. 1985).

Weber v. State, 457 A.2d 674 (Del. 1983); People v. Smith, 93 Ill.2d 179, 66 Ill. Dec. 412, 442 N.E.2d 1325 (1982); Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985);[5] Commonwealth v. Sherman, 389 Mass. 566, 450 N.E.2d 566 (1983); Yates v. State, 467 So.2d 884 (Miss. 1984); Lewis v. State, 695 P.2d 528 (Okl. 1984); State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979); Commonwealth v. Hilliard, 471 Pa. 318, 370 A.2d 322 (1977); State v. Jones, 19 Wash. App. 858, 578 P.2d 71 (1978).[6]

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[5] The State of Maryland has recently petitioned for certiorari to this Court on this issue. Maryland v. Lodowski, Case No. 85-23, 37 CrL 4115.

[6] Other states have found that the requirement that an accused be informed of an unrequested counsel's efforts to reach him to be grounded in their state constituions. See, e.g.,

The federal courts of appeal have not specifically addressed this issue. As stated supra, the First Circuit in Burbine v. Moran, supra, held that the defendant's Fifth Amendment rights were violated by the police officers' failure to tell the defendant that an attorney acting for him had called to offer his services. However, in Fuentes v. Moran, 733 F.2d 176, 181 (1st Cir. 1984), the First Circuit rejected a similar claim, finding that where the defendant knew of his right to counsel and counsel's availability, the failure to notify the defendant of counsel's inquiry on his behalf did not make the waiver unknowing.

(Footnote 6 continued), State v. Matthews 408 So.2d 1274 (La. 1982); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

The Eleventh Circuit in two opinions touched peripherally on the issue. In Hance v. Zant, 696 F.2d 940, 947 (11th Cir. 1983), the Court held that neither the defendants Fifth or Sixth Amendment rights were not violated by not informing him that an attorney, not yet retained by the defendant, was attempting to locate and advise him of his rights. Similarly in Palmes v. Wainwright, 725 F.2d 1511, 1520 n. 9 (11th Cir. 1984), the court rejected the requirement that counsel need be present to advise the defendant to not speak with police.

The decision of the Supreme Court of Florida in the present case has engrafted onto the Fifth Amendment and has expanded this Court's opinion in Miranda v. Arizona, supra,

to include a requirement that no matter what the other circumstances are, that in order for a waiver of rights to be voluntarily, knowingly and intelligently made, the police officers must advise an accused that counsel, unrequested by him, and retained by a third party has attempted to contact him. The failure to do so will vitiate a valid waiver, regardless of how experienced a defendent is, and regardless of how many times a defendant has been told that he does not have to talk, and that he has the right to have an attorney present. Such holding necessarily implies that the Miranda warnings mean absolutely nothing and that a defendant is unable to waive those rights without the advice of counsel. Under the Supreme

Court of Florida's opinion, the Fifth Amendment rights do not belong personally to the defendant, but rather belong to the attorney, as the focus shifts from the defendant's rights to an alleged right of the attorney to intervene in order to advise the defendant to stop talking.

"Whatever, its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he 'spring(s) to the telephone' hardly seems a rational way of reconciling the interests of the accused with those of society." Kamisar, Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter? 67 Geo. L.J. 1, 95 (1978). The desirability of legal assistance during interrogation

should not turn upon the rapidity with which third parties have acted to retain an attorney to enter the proceedings. If Miranda warnings are insufficient to protect Fifth Amendment rights, this insufficiency should not be addressed by a rule which would protect only those with money and connections "to bring a lawyer swiftly into the fray" and which "would seem to favor the 'professional criminal' most of all." Id. at 95-96.

Society has a legitimate interest in the questioning of suspects as part of law enforcement. Culombe v. Connecticut, 367 U.S. 568, 578 (1961). Government has the responsibility to protect the security of its citizens, i.e., victims, as

well as those who may be accused of crime. In striking a balance between these interests this Court has never adopted any per se rules or isolated any one circumstance. Cf. Schneckloth v. Bustemonte, 412 U.S. 218, 248-249 (1973) (a defendant's unawareness of his right to refuse a warrantless search is only one circumstance to be considered in determining the voluntariness of the consent). A rule such as the one espoused by the Supreme Court of Florida, in effect allows third parties to unilaterally invoke the constitutional rights of a defendant. It ignores the other circumstances surrounding the waiver, such as in the instant case, the Respondent's experience with the criminal justice system,

his knowledge that his sister had contacted an attorney for him, the officers having repeatedly advised him of his rights and Respondent's repeated waivers of those rights.

The Supreme Court of Florida's abrogation of the Fifth Amendment and Miranda v. Arizona, supra, as well as the express and obvious diversity and conflict among the states as to the effect an unrequested counsel's interjection into the proceedings affects a previous valid waiver of rights, warrants jurisdiction under this Court's rules and substantive law. The express purpose of the framers of the Constitution in establishing this Court was "to secure the national rights [and] uniformity of Judgments." Letter from Chief

Justice Hughes, March 23, 1937, quoting John Rutledge of South Carolina, reprinted in 81 Cong. Rec. 2814-2815 (1937). That supreme purpose of this Court would be properly met by the exercise of jurisdiction herein.

B. WHETHER THE FLORIDA SUPREME COURT'S FAILURE TO CONSIDER THAT THE ALLEGED CONSTITUTIONAL ERROR IN THE ADMISSION OF A DEFENDANT'S STATEMENT'S WAS HARMLESS BEYOND A REASONABLE DOUBT IN LIGHT OF OTHER EVIDENCE, INCLUDING THE TESTIMONY OF TWO OTHER WITNESSES TO WHOM THE DEFENDANT HAD CONFESSED IN DETAIL TO COMMITTING THE MURDER, CONFLICTS WITH THIS COURT'S DECISION IN MILTON V. WAINWRIGHT 407 U.S. 371 (1972).

The Supreme Court of Florida in its opinion simply found that

the failure to suppress Respondent's recorded statement given from 3:56 until 4:20 p.m., while the attorney was attempting to see him, was reversible error. (A. 10). In so doing, the state court failed to review whether the statement's admission was harmless beyond a reasonable doubt, thus confiicting with this Court's opinion in Milton v. Wainwright, 407 U.S. 371 (1972).

In Milton v. Wainwright, supra, this Court held that before reversing a conviction for the admission of a defendant's statement procurred in violation of the defendant's Fifth or Sixth Amendment rights, the court must review the record to determine if any error in its

admission was harmless beyond a reasonable doubt. 407 U.S. at 372-373. In Milton, this Court held the alleged error to be harmless where, the jury, in addition to hearing the challenged testimony, was presented evidence of three other valid full confessions that were made by the defendant.

In the instant case, the Respondent did not admit to committing the murder, but he did admit to breaking into the victim's house and seeing the body. Even without that admission, the state was able to prove that the Respondent had broken into the victim's house. His fingerprint was found on a newly replaced jalousy at the point of entry. In

his initial statement to the police, which was not the subject of Supreme Court of Florida's order of suppression, Respondent attempted to explain his fingerprint by stating that he had been in the victim's apartment only one time, to smoke some marijuana. However, that statement was contradicted at trial by witnesses who testified that the victim was somewhat of a racist who did not socialize with blacks. Even more important the state properly introduced the testimony of Respondent's brother and his brother's girlfriend. Both testified that Respondent had admitted in detail to both of them, on separate occasions, that he had committed the murder.

Thus, it is clear that not only did the Supreme Court of Florida fail to consider, but also failed to properly apply, the harmless beyond a reasonable doubt standard in the present case. This failure is in conflict with this Court's opinion in Milton v. Wainwright, supra, and the Petitioner would therefore urge this Court to grant certiorari on this issue and reaffirm the principle that constitutional error is subject to the harmless beyond a reasonable doubt standard as espoused in this Court's prior decisions and which has been severely abrogated by the opinion of the Supreme Court of Florida.

CONCLUSION

Petitioner has sought to present to this Court a substantial basis upon which to conclude that this area of law is deserving of being addressed by the United States Supreme Court. There is a solid jurisdictional basis predicated upon conflicts between the opinion under review and the opinions rendered by other state courts of last resort and federal courts of appeal. Further, there are substantial questions of federal law that have serious nationwide ramifications, which is shown by this Court's acceptance of jurisdiction in a case specifically relied on by the state court in the present case. There are no collateral

issues contained in the instant factual pattern which could have effect of diverting this Court's attention away from the issues herein presented. On the basis of the above, Petitioner submits that the instant Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

No. 64,510

JERRY HALIBURTON, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[August 30, 1985]

SHAW, J.

This is a direct appeal from convictions for burglary and first-degree murder and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We reverse.

The body of Don Bohannon was found in his bed on the afternoon of August 9, 1981. Medical evidence indicated that death, caused by multiple stab wounds, had occurred sometime after 12:30 a.m. that morning. The perpetrator had gained entry to the victim's apartment by removing

glass panes from a jalousie door. Fingerprint evidence led the police to appellant, who lived nearby in downtown West Palm Beach.

Appellant was taken to the police station on August 13, 1981, at about 6:30 a.m., advised of his rights, and questioned until 9:30 a.m., and then again at 10 a.m. for another ten minutes. He submitted to a polygraph examination 2:05 p.m. Meanwhile appellant's sister retained an attorney to represent him. The attorney called the police near the end of the polygraph examination and requested that the questioning stop. The attorney arrived at the police station a few minutes before 4 p.m. and asked to speak with appellant, but was not allowed to do so. Appel-

lant gave a recorded statement from 3:56 until 4:20 p.m. that was played to the jury. By 4:18 p.m. the attorney had a telephone court order requiring that the police give him access to appellant. After the judge's second phone call, the police chief ordered that the interrogation cease, and the attorney was able to see appellant.*

Appellant did not admit to committing the murder in the recorded statement that concluded at 4:20 p.m., but he did admit breaking in and seeing the body. He was arrested

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*On a subsequent occasion, the same police department did not so readily acquiesce to the same judge's order. Jamason v. State, 455 So.2d 380 (Fla. 1984), cert. denied, and appeal denied, 105 S. Ct. 768 (1985)

for first-degree murder and burglary. The grand jury did not return an indictment for the murder, and he was released on bond. The right to speedy trial was waived on December 17, 1981.

Subsequently appellant's brother and his brother's girlfriend went to the police, stating that appellant had admitted on separate occasions to each of them that he had committed the murder. With this additional evidence, the state attorney obtained a grand jury indictment on March 24, 1982. The trial jury returned verdicts of guilt for the burglary and first-degree murder and recommended the death sentence, which the trial court imposed.

Appellant first argues that the

180-day speedy trial period of Florida Rule of Criminal Procedure 3.191(a)(1) expired on February 9, 1982, as to the murder because of his August 13, 1981, arrest. He claims that the subsequent waiver of speedy trial, following the grand jury's refusal to indict, applied only to the burglary charge and that his murder conviction must be reversed and the cause remanded with instructions to discharge him. We disagree. "A defense continuance constitutes a specific waiver of the speedy trial rule (or, more properly, an estoppel precluding reliance on the rule) as to all charges which emanate from a single criminal episode." Gallego v. Purdy, 415 So.2d 166, 167 (Fla. 4th DCA 1982) (citing

State v. DeSimons, 386 So.2d 283 (Fla. 4th DCA 1980); State v. Corlew, 382 So.2d 787 (Fla. 2d DCA 1980)).

We find merit in appellant's second argument, however, that the trial court erred in refusing to suppress the statements appellant gave subsequent to the time the attorney arrived at the police station and requested access to him. Although a defendant's right to have counsel present during custodial interrogation may be waived, the waiver must be knowingly and intelligently made. Miranda v. Arizona, 384 U.S. 436 (1966).

In finding that appellant did not waive his right to counsel, we agree with Chief Justice Bevilacqua of the Rhode Island Supreme Court in State

v. Burbine, 451 A.2d 22, 35 (R.I. 1982) (Bevilacqua, C.J., dissenting) (emphasis in original):

> [A]lthough a suspect has previously been informed of his abstract right to counsel and has waived that right, he must be informed when his counsel actually seeks to advise him and must knowingly and intelligently reject such opportunity before subsequent statements may be taken and used against him. State v. Haynes, 288 Cr. at 70, 602 P.2d at 273.

Our emphasis is on fairness in apprising a defendant of the recourse available to him. In order for the right to counsel to be meaningful, a defendant must be told when an attorney who has been retained on his behalf is trying to advise him. If the defendant wishes to reject the opportunity for such advice, he may do so. The determination of the

need for counsel is the defendant's prerogative. State v. Craig, 237 So. 2d 737 (Fla. 1970). The police do not have to obey a telephone order of an attorney to cease questioning a defendant, but do have to advise a defendant that an attorney retained on his behalf wishes to speak with him. In Escobedo v. Illinois, 378 U.S. 478 (1964), the Supreme Court quoted with approval from People v. Donovan, 13 N.Y. 2d 148, 243 N.Y.S. 2d 841, 193 N.E. 2d 628 (N.Y. 1963):

> [T]hat court, in an opinion by Judge Fuld, held that a "confession taken from a defendant, during a period of detention [prior to indictment], after his attorney had requested and been denied access to him" could not be used against him in a criminal trial. The court observed that it "would be highly incongruous if our system of justice permitted

> the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police."

Escobedo, 378 U.S. at 486-87 (citations and footnotes omitted). See also Darwin v. Connecticut, 391 U.S. 346 (1968). In Donovan, as in the present case, counsel had been retained on the defendant's behalf by his family. Our holding turns on the fact that the attorney retained by appellant's sister on his behalf was in the station house requesting to speak with appellant. The failure of the police to convey this information to appellant violated his otherwise valid waiver.

The state argues that we should find appellant's waiver valid under

our decision in State v. Craig. We are unpersuaded, however, as the issues before us in Craig were the adequacy of the preinterrogation warnings to inform the defendant of his right to consult with an attorney and have the attorney, with him during interrogation and the manner in which the defendant expressed his desire to waive counsel.

Accordingly, we find the failure to suppress the recorded statement to be reversible error. We therefore reverse the convictions for burglary and first-degree murder and remand for a new trial.

It is so ordered.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Palm Beach Court, Jack J. Cook, Judge - Case Nos. 81-5015 CF and 82-1893 CF

Charles W. Musgrove, West Palm Beach, Florida

for Appellant

Jim Smith, Attorney General and Russell S. Bohn, Marlyn J. Altman and Penny H. Brill, Assistant Attorneys General, West Palm Beach, Florida

for Appellee

SUPREME COURT OF FLORIDA

THURSDAY, OCTOBER 24, 1985

JERRY HALIBURTON,	*	
	*	CASE NO. 64,510
Appellant,	*	
	*	Circuit Court Nos.
v.	*	81-5015CF
	*	82-1893CF
STATE OF FLORIDA,	*	(Palm Beach)
	*	
Appellee.	*	
	*	

* * * * * * * * * * * *

Upon consideration of the Motion for Rehearing and Stay of Disposition of Motion for Rehearing and Withhold of Mandate filed in the above cause by attorney for appellee, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied as to the Motion for Rehearing, and it is further

ORDERED that the proceedings in

this Court and in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, are hereby stayed to and including November 28, 1985, to allow appellee to seek review in the Supreme Court of the United States and obtain any further stay from that court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. John B. Dunkle, Clerk
Hon. Jack H. Cook, Judge
Charles W. Musgrove, Esquire
Penny H. Brill, Esquire

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR PALM BEACH
COUNTY.
CRIMINAL DIVISION

Case No. 81-5915 CF
82-1893 CF

State of Florida

vs.

Jerry Haliburton

Defendant.

ORDER

This cause came on before the Court upon defendant's motion to suppress. Upon hearing argument of counsel and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that the motion to suppress is hereby denied.

DONE AND ORDERED this 8th day of November, A.D., 1982

W. C. Williams III
Circuit Judge

Copies furnished counsel.

Excerpt from the Evidentiary Hearing on Respondent's Motion to Suppress, Testimony of Sergeant Calvin Bryant:

Q. Do you recall whether you said anything to Mr. Haliburton about phone calls?

A. Yes, sir. After entering the office, I told him that a lawyer had called. One of his sisters had called a lawyer for him that was supposed to come to the police station and whenever he got there, he could talk to him, if he wanted to.

Q. Did you say this in the presence of Houser or Mariano, or do you know, at this point?

A. Yes, sir, we were the three of us, sitting there at Sergeant Mariano's desk.

Q. Was it offhandedly, or somber, as the way that you read the rights.

A. Basically the way that I am talking now. I just told him, just told him to make him aware of it.

Q What was the defendant's response to that?

A. Well, he didn't say yes, he wanted to talk to him and

he didn't say no, he didn't want to talk to him. He just sort of slunked his shoulders, like, I will wait until they get here and see.

Q. Then you spoke to Mr. Haliburton again?

A. Yes, sir.

Q. When did that started?

A. Well, again all of the statements made by Mr. Haliburton were recorded on a tape recorder. After going into Mr. Mariano's office, before getting the tape recorder, this time it was out on my desk. I spoke briefly with Mr. Haliburton, to find out, I guess, what it was that he had told Mr. Mariano and whether or not he wanted to tell myself and Sergeant Houser. He didn't express any objections. He was still willing to talk and after ascertaining that he was going to talk to us, I went and got the tape recorder and brought it into the office.

(R. 342-344)

* * *

Q. Now, did you tell Mr. Haliburton that Mr. Burford had called, the first time at 2:30?

A. Yes, sir, I did.

Q. Did you tell him that at 2:30?

A. Not at 2:30, no.

Q. How about the call that Mr. Burford made at 2:45, did you tell Mr. Haliburton about the call at 2:45?

A. No. The only time that I told him was when we went into the Polygraph office at 3:50.

Q. 3:50 -- ten minutes to four?

A. Yes.

Q. About an hour between the time that he called to the time that you called Jerry Haliburton; is that right?

A. Yes, sir.

Q. Now, you didn't put that on tape did you?

A. Nothing that was before I got the tape recorder.

Q. Well, the fact that you are informing him that an attorney was going to be there, that's sort of important; isn't it? As far as the particular confession is concerned?

A. Yes, I'd say that it's important. Yes.

Q. That's what we are here for now, where and under what circumstances Mr. Haliburton was informed of his rights; is that right?

A. Yes, sir.

Q. It was important that particular piece of information be recorded somehow; isn't that right, the information?

A. The way that things happened, he --

Q. Please answer the question. Is that right or not?

* * *

A. Yes, sir, I suppose so.

Q. You didn't do that?

A. No, sir.

Q. Do you remember taking your deposition on January 13th of this year?

A. Yes, sir.

Q. I believe that the Court Reporter was present and Mr. Barkin was present?

A. Yes, sir.

Q. And another attorney by the name of Mitchell Beers was present?

A. Yes, sir.

Q. And Mr. Beers asking you questions as far as what happened in the case, so on and so forth?

A. Yes.

Q. He asked a lot of questions about what happened during the taking of this particular tape, the confession; didn't he?

A. Yes, sir.

Q. I refer Counsel to page 48 of the deposition, line 8. I am going to read you some thing here from what Mr. Beers asked you. "Did you inform Mr. Haliburton that an attor-

ney called?" Answer, "I told him and it came out sometime there about." Question, "You didn't tell him that an attorney called you at 2:30, when you started interviewing him again at 3:56; did you?" Answer, "No, I don't believe so, no." Do you recall taking that statement?

A. Yes.

Q. That is not what you are telling us today; is it?

A. No, sir, it's not.

Q. So, there is a substantial difference between what you said then and what you are saying now!

A. I made a mistake during the deposition. I didn't accurately remember whether I told him or didn't. I gave it considerable thought afterwards and I did tell him about the attorney having called.

(R. 348-351).